

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

JEROME O. HERLIHY  
JUDGE

NEW CASTLE COUNTY  
COURT HOUSE  
WILMINGTON, DE 19801-3733

*Submitted: March 11, 2010*

*Decided: May 26, 2010*

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RE: *State v. Stacey Moody*  
*ID No. 0812002648*  
*Upon Motion of the Defendant to Dismiss - **DENIED***

Dear Counsel:

Defendant Stacey Moody has moved to dismiss the case against her for failure to timely prosecute. This case is scheduled for a retrial on May 25, 2010, after a mistrial had been declared during an earlier trial in December 2009.

There are some unique factors to the case preceding and following the December mistrial. A listing of events helps clarify those unique factors:

1. Arrested December 4, 2008.
2. Indicted January 20, 2009, with co-defendant Kenneth Swanson.
3. First case review for both defendants was February 23, 2009.
4. On March 3, 2009, co-defendant Kenneth Swanson moved to sever Count VIII of the indictment charging him with Possession of a Firearm or Ammunition by a Person Prohibited.
5. On the same date, Swanson moved to have the State identify its informant.
6. Final case reviews for both defendants were June 20, 2009.

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7. The initial trial date was set for June 30, 2009, for both defendants.
8. The State moved on June 24, 2009, to amend the indictment. The State's motion sought to clarify that the prior conviction stated in Count VIII related to Moody only. It also sought to add a new Count IX against Swanson for the same prohibited charge but based on his own separate prior conviction.
9. On June 30th trial was continued because of undecided motions. A judge heard matters on the motions but had to continue the trial date. A new trial date of September 1, 2009, was set.
10. Co-defendant Swanson's charges were *nol prossed* on August 5, 2009.
11. Up until July 13, 2009, Moody had been represented by an assistant Public Defender. On that date, a so-called conflict letter was submitted and the first conflict counsel was appointed on July 21, 2009. The conflict noted on July 13th was that the Public Defender's Office also represented the co-defendant, but that was not the case. Another conflict counsel represented co-defendant Swanson.
12. For reasons not clear in the record, a different conflict attorney was appointed on August 12, 2009.
13. On August 21st, that counsel requested a continuance of Moody's September 1st trial date because he was starting a first degree murder trial on August 31st. The continuance was granted and a new trial date of December 8, 2009, was set.
14. The trial started as scheduled on that date. The defendant is charged with possession with intent to deliver (2 counts) use of a dwelling for keeping controlled substances, possession of a firearm during the commission of a felony, conspiracy second degree, and possession of drug paraphernalia.
15. During the trial, the chief investigating officer revealed that Moody had made an incriminating statement about the offenses. The officer had not told the prosecutor of this. The Court declared a mistrial at the defendant's request.
16. A new trial date of February 4, 2010, was established. That date was set in the Prothonotary's Office. There was no consultation with me. That is a time when I was in civil rotation, and a date on which I was not available nor ever notified that the case was on for trial that day.
17. The long-standing practice in Superior Court is that a judge who presides over a retrial or a trial after a mistrial has been declared, presides over the subsequent trial. Because of the

circumstances of the mistrial, the judge assigned to handle the February 4th trial ruled that I should retry the case.

Moody has moved to dismiss arguing undue delay. The Court, in light of the history of the case, sees the need to examine Moody's motion through two related lenses. One is the delay issue raised and the other is the issue of the State's discovery violation.

The first trial date was June 30, 2009. At that time Moody was scheduled to go to trial with co-defendant Kenneth Swanson. He had filed two pre-trial motions, one to sever a weapons charge, and another to have the State's confidential informant identified.<sup>1</sup> Those motions and a separate motion from the State were taken under advisement by the trial judge. He continued the case.

As of the first trial date, however, the Public Defender's Office was representing Moody. The next trial date was set for September 1st, but before that date the Public Defender noted a conflict. That was done on July 13, 2009, and on July 21st conflict counsel was appointed. He, however, had a murder trial starting just before the September 1st trial date for Moody. His request for a continuance of the Moody case was granted and the December 8th date was given.

Moody's motion to dismiss implicates two overlapping considerations. One is the constitutional right to a speedy trial the other involves consideration under this Court's Criminal Rule 48(b).

On the constitutional side, there are four tests the Court is to employ to determine if a defendant has been deprived of the right to a speedy trial. They are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant.<sup>2</sup>

As to the first test, the trial scheduled for May 25th is seventeen months from the date of Moody's arrest and sixteen months from the indictment. The initial trial was scheduled for six months post-arrest. The second trial was scheduled eight months from arrest and seven months from indictment. The trial which ended in a mistrial was twelve months from arrest. The next trial was fourteen months from arrest.

In regard to the second test, the reason for the delay in the June trial was prompted by several motions, one from the State and two from the (then) co-defendant. The Court took these motions under advisement and continued the trial until September 1st. But Moody's counsel had to change due to a conflict, and he was unable to go to trial on that date because of a first degree murder case. The Court scheduled the next date.

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<sup>1</sup> *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973).

<sup>2</sup> *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L.Ed.2d 101, 117-18 (1972).

Up until then, the State had done nothing in Moody's case to delay the proceedings. Its motion to amend the indictment related to correcting the charge against the co-defendant which would have left the charge in Count VIII, possession of firearm by person prohibited, against Moody intact. Under the circumstances the Court cannot attribute the "delay, such as it were, to the State, as prosecutor."<sup>3</sup>

The pages turn, however, because at the December trial, the chief investigating officer divulged that Moody had made a statement to him of which the prosecutor had, up to that moment, been unaware. As for the record and Court's file indicate Moody's first counsel, the one who ultimately conflicted out, did not request to get any statements given by her client. Nor did later conflict counsel.<sup>4</sup>

The Court is unaware of the exact nature of Moody's alleged statement to the police, but indications are that it is incriminating. The Court's dilemma is that without a formal discovery request, there was no trigger for the prosecutor to contact the officer, who apparently did not even tell her before he took the stand. It would be speculative to say what would have happened if such a formal discovery request had been made. This case differs, therefore, from *Johnson v. State*<sup>5</sup> and *Skinner v. State*<sup>6</sup> where there were specific defense pre-trial requests for statements given by the defendant, and there had been such statements but they were not timely provided to the defense.

Another factor muddying the waters is that Moody apparently did not tell counsel of any statement given to the police.

When there is a discovery violation, the Court has four options: (1) order prompt compliance with the discovery rule, (2) grant a continuance, (3) prohibit the party from introducing into evidence the material not disclosed, or (4) such other relief as the Court deems appropriate.<sup>7</sup>

A further complicating factor here is that the office divulged the existence of Moody's alleged statement in the jury's presence. This prompted the defense motion for a mistrial. There was no other option for the Court at that moment. Whatever the incriminating nature of Moody's statement may have been, it has not deterred her from seeking to go to trial. Of course, she now seeks to prevent the May 25th trial by her motion to dismiss.

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<sup>3</sup> *State v. McElroy*, 561 A.2d 154 (Del. 1989).

<sup>4</sup> There is one discovery request in the file and that was for the State to identify all persons in the chain of custody for the drugs seized.

<sup>5</sup> 550 A.2d 903 (Del. 1988).

<sup>6</sup> 575 A.2d 1108 (Del. 1990).

<sup>7</sup> *Doran v. State*, 606 A.2d 743, 745 (Del. 1992).

In this Court's view, therefore, the State has caused the delay from December 9, 2009, to May 25, 2010. The record just noted is that even with the so-called statement, Moody wants a trial. Her assertion of her right to speedy trial came after the February 4, 2010, trial date was further postponed by this Court's mishandling of the rescheduling from December 9th.

In part, therefore, the "blame" for the December to May trial date delay cannot be laid entirely on the State's, as prosecutor, doorstep. The Court shares some blame. The unacceptable discovery violation can, however, be put there, albeit not at the individual prosecutor's doorstep. The December - May delay is a mixture which, in the Court's view, tilts slightly in Moody's favor.

As to the third factor, Moody asserted her right to a speedy trial in February, about three months before the latest trial date. But the reasons for the delay in the past were a mixture of defense counsel's scheduling conflict and this Court taking under advisement various motions. While those motions were from the co-defendant, his trial was scheduled with Moody's in June. The charges against him were only dropped later due to witness problems.

The final and fourth factor this Court has to weigh is prejudice to the defendant. With this factor, there are three defense interests to be examined: (1) preventing oppressive pre-trial incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility the defense will be impaired.<sup>8</sup>

Moody made bail two months after she was arrested. She has remained out on bail since. There is anxiety here and it is manifested by her continuing request for a trial. But she has offered nothing to show how her defense is or might be impaired. In short, she makes a case of prejudice but not one so compelling as to warrant dismissing the charges.

The discovery violation needs to be addressed. The Court holds that in this case the State may not use her alleged statement in its case-in-chief or in rebuttal.<sup>9</sup>

This Court's *Barker/Middlebrook* constitutional analysis does not end the consideration of Moody's motion to dismiss. Her motion implicates this Court's Criminal Rule 48(b). That rule is a discretionary one which is not governed by constitutional speedy trial principles.<sup>10</sup> The Supreme Court has stated about Rule 48(b):

We hold that for criminal indictment to be dismissed under Rule 48 for "unnecessary delay," the delay, unless extraordinary, *i.e.*, of constitutional dimensions, must, as a

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<sup>8</sup> *Middlebrook*, 802 A.2d at 276.

<sup>9</sup> *Johnson v. State*, 550 A.2d at 913.

<sup>10</sup> *State v. Johnson*, 564 A.2d 364, 370 (Del. Super. 1989).

general rule, first be attributable to the prosecution and second, such delay must be established to have had “a prejudicial effect upon defendant” beyond that normally associated with a criminal justice system necessarily strained by burgeoning case load.<sup>11</sup>

The record in this case is that the State was responsible for some of the delay. At the time of the initial trial in June, 2009, the State had a motion pending but so did Moody’s then co-defendant. This Court took them under advisement prompting that trial date to be continued. The record, therefore, is mixed and nothing egregious. There was no unnecessary delay up to that date. The initial trial date was about 150 days from indictment.

The first “clearer” time the State had a role in any delay arises from the events at the December trial. Certainly between then and the February 4, 2010, trial date the delay is attributable to the State. Even though the Court mishandled the setting of that date, prompting a fourth delay, it was the State’s action as prosecutor (police) which was the “but for” in leading to the May 25, 2010, trial date.

Allowing for the five month delay from the December to May trial dates “prosecution” caused, this Court does not find it to be a Rule 48(b) dismissal dimension. The delay earlier in 2009 was mostly defense caused, but not in a critical sense; although an earlier identification of the conflict by the Public Defender may have mitigated the delay.

The Court finds a Rule 48(b) dismissal is not warranted.

### ***Conclusion***

For the reasons stated herein, defendant Stacey Moody’s motion to dismiss is **DENIED**.

**IT IS SO ORDERED.**

Sincerely,

JOH/krb  
cc Prothonotary

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<sup>11</sup> *State v. McElroy*, 501 A.2d at 155-56.